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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 834

In the Matter
of
JACOB A. MILLSTEIN,
Petitioner,
against
CO-ORDINATING COMMITTEE ON DISCIPLINE,
Respondent.

PETITIONER'S REPLY BRIEF

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PAGE

TABLE OF CONTENTS

	PAGE
In Reply to Respondents' Point I	1
In Reply to Respondents' Point II	4

Cases Cited:

Brady v. *State of Maryland,* 373 U. S. 83, 83 S. Ct. 1194	2
Jencks v. *United States,* 353 U. S. 657, 77 S. Ct. 1007	2

Statute Cited:

28 U.S.C.A. Section 1257	4

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In Reply to Respondents' Point I

Although many charges were preferred against the petitioner, and prosecuted by respondent,[1] he was found guilty and disbarred on only three of them. Three persons, *Cruz, Padilla* and *Holt,* who were not called as witnesses by respondents, were critically involved in those three charges. This is not denied by the respondents.

Respondents also do not deny that in the course of their investigation they obtained and throughout the proceedings against petitioner they were in possession of statements or testimony taken by them from Cruz, Padilla and Holt.

1. Referred to in the text as "respondents" by reason of their constituent nature.

The issue then is whether an attorney under charges and on trial for his honor and professional life is entitled to the same rights of disclosure upon demand that a criminal defendant is. This Honorable Court has held that due process requires such disclosure. We are not dealing here with any "fishing expedition" or any unusual expansion of normal and established concepts of a fair trial.

It is the withholding of *evidence* by a prosecution which determines whether the standards of due process have been met. In the case at bar such a withholding took place and is not denied by the respondents. Respondents cannot now be heard to argue that petitioner might have discovered the same evidence. Evidence was and still is in existence. Respondents had and still have that evidence. This is no game in which the petitioner loses if he cannot match the respondents' investigative resources which are also aided and abetted by the broadest kind of subpoena power (see respondents' brief).

It is an impoverished argument, indeed, which proposes that a prosecutor's withholding of evidence is excusable if the defendant can call as witnesses those persons who gave the withheld statements to the prosecutor. There is nothing in *Brady* v. *State of Maryland*, 373 U. S. 83, 83 S. Ct. 1194, or *Jencks* v. *United States*, 353 U. S. 657, 77 S. Ct. 1007, which even suggests such a bizarre standard. The suggestion seems to be that respondents as a public body had the right to a selective presentation of those witnesses most likely to insure conviction. Respondents here miss the point completely. Elementary fairness required that the petitioner be allowed to read what these three crucial witnesses said to the prosecutor at a time when they were free of the pressures of trial, within the protective confines of the prosecutor's office and

perhaps exculpating the petitioner by telling the truth. Try as one might, one cannot fathom why the prosecution here insisted on withholding the statements of these three crucial witnesses even *after* the prosecution completed its case. The inference is fairly drawn and inescapable that Cruz, Padilla and Holt *exculpated* the petitioner or else cast such doubt on the credibility of the prosecution's other witnesses as to make it mandatory on the prosecution not to call Cruz, Padilla and Holt as witnesses and to withhold their statements lest their disclosure lead to their being called as witnesses by petitioner.

This Honorable Court has held that where a prosecutor is in possession of *evidence,* it must be disclosed on demand. These respondents were no less prosecutors than a district attorney is a prosecutor. In the case at bar, demand for the withheld evidence was made before the hearings started, and demand was again made on respondents during the hearings, but after the respondents' case was concluded and they could no longer be prejudiced by any disclosure.

And so we come to the fundamental issue. Is the standard of due process for an attorney under charges different than it is for a criminal defendant?

It is respectfully submitted that this is a critical issue and national in significance. It is the bar which is universally hailed by innumerable statesmen at almost every public opportunity as the bulwark of liberty. If members of the bar can be disciplined without *complete* regard for and adherence to the standards of due process, then the bar must of necessity become a fearful bar. It it too obvious to be pressed that a fearful bar is worse than no bar at all.

In Reply to Respondents' Point II

28 U.S.C.A. 1257, establishes jurisdiction in this Court for review where any "right, privilege or immunity is * * * claimed under the constitution * * *".

Petitioner claims that he was denied the equal protection of the laws by the failure of the courts in New York to grant him a discovery to which he was statutorily entitled—assuming a disciplinary proceeding to be a civil proceeding. The Fourteenth Amendment imposes upon the states the obligation to afford to their citizens the equal protection of their laws. By denying to petitioner the right to a discovery assured him by statute, the courts of New York denied him the equal protection of the laws of New York.

This Honorable Court has jurisdiction of such issue.

CONCLUSION

It is respectfully submitted that the Writ sought should be granted.

Respectfully submitted,

LEONARD FELDMAN,
Attorney for Petitioner.